UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

KEN MADDOX HEATING & AIR CONDITIONING, INC.

and

Case Nos. 25-CA-24297 et al. (E)

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNON NO. 20, a/w SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO

Michael T. Beck, Esq., for the General Counsel. Todd M. Nierman Esq., of Indianapolis, Indiana, for the Respondent. Neal E. Garth, Esq., of Indianapolis, Indiana, for the Charging Party.

SUPPLEMENTAL DECISION

Robert A. Giannasi, Administrative Law Judge: On September 5, 2003, the Board (Member Liebman concurring) issued a decision, reversing Judge Richard H. Beddow, Jr., who twice had found violations, and dismissing allegations that Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire or consider a group of union members for employment and paying the one known union member who was hired lower wages than other hires. 340 NLRB No. 7.

On October 6, 2003, the Respondent filed an application for fees and expenses pursuant to the Equal Access to Justice Act, Pub. L. 96-481, 94 Stat. 2325 (EAJA) and Section 102.143 through Section 102.155 of the Board's Rules and Regulations. The General Counsel filed a motion to dismiss the application on procedural grounds, which I denied in an order dated November 25, 2003. The General Counsel thereafter filed an answer to the application and the Respondent filed a response to the answer. Although the General Counsel repeats in its answer the procedural arguments rejected in the order denying the motion to dismiss, the issue here is whether the General

¹ Judge Beddow has retired and the EAJA case was assigned to me under Section 102.26 of the Board's Rules.

JD-4-04

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Counsel was "substantially justified" in issuing the complaint and pursuing the litigation.

A. Background and the Underlying Decisions

As discussed more fully at slip op. 1-2 of the Board's decision, this case was spawned by the Charging Party Union's salting campaign. During the relevant time period, the Respondent frequently ran newspaper ads seeking to fill certain positions. In response to the ads, members of the Union made overt and covert applications for those positions. Only 1 of 37 overt union applicants was hired, Jesse Stamper; one covert member was also hired. During the relevant time period, the Respondent hired some 56 employees, none of whom were known union members, so far as the record shows. In the judge's first decision, he found that, prior to the events in this case, the Respondent hired 95% of its employees under a referral policy that gave a priority to former employees or applicants referred by current employees and business associates. According to two of the Respondent's witnesses, if referrals or former employees were not available, the Respondent then turned to other applicants, including those who responded to newspaper advertisements, depending on whose application carried the earlier date, a so-called "top-of-the pile" rule. The judge found that the Respondent's referral policy was "inherently destructive of important employee rights" within the meaning of NLRB v. Great Dane Trailers, 388 U.S. 26 (1967), thereby supporting the complaint allegation of discrimination for the failure to hire or consider the overt union applicants. Relying in part on that finding, the judge also found unlawful the payment to Stamper of lower starting wages than other hires. While the case was pending before the Board on exceptions, the Board issued its clarifying decision in FES, 331 NLRB 9 (2000), affd. 301 F.3d 83 (3d Cir. 2002), and the Board remanded the matter to the judge for consideration of that decision. In his second decision, the judge reaffirmed his earlier findings to the extent consistent with FES.

In its decision, the Board rejected the judge's finding that the Respondent's referral policy was itself violative of the Act because that theory of violation was neither alleged by the General Counsel nor litigated. The General Counsel's theory was that the union applicants were subjected to discrimination because of disparate treatment and what was perceived to be a hiring system closed to union applicants. In considering that theory under a traditional Wright Line analysis (251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982)), the Board found that the General Counsel had not proved unlawful motivation for the Respondent's conduct by a preponderance of the evidence. The Board in effect found that the evidence with respect to the disparate treatment of union applicants and the seemingly closed hiring system was outweighed by the application of a neutral hiring policy that preceded the alleged unfair labor practices. Thus, it found that the Respondent hired 6 applicants, including 1 union applicant, who were neither former employees nor referrals and that numerous non-union applicants were also rejected under the Respondent's hiring system. In the Board's view, "this suggests that antiunion discrimination did not influence the Respondent's hiring decisions." Slip op. 3. The Board also rejected the judge's finding that the Respondent's hiring policies were applied in a disparate and pretextual manner. Contrary to the judge, the Board independently analyzed the evidence on this issue and made different inferences, concluding that the Respondent's hiring policies were not applied inconsistently or in a disparate manner. The Board also

JD-4-04

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drew a different inference than the judge on the Respondent's use of "frequent employment advertisements." It concluded that a Respondent's witness's testimony "suggests" a legitimate reason for the frequent ads, that is to maintain a pool of current applicants in case the referral policy did not yield the number of applicants needed. Since, according to the Board, the judge's finding concerning the alleged payment of lower wages to Stamper, depended primarily on his finding of discrimination in the hiring policies of Respondent, it likewise reversed the judge on this issue. The Board also analyzed additional evidence surrounding the Stamper interview and drew a different inference from that evidence than the judge.

Member Liebman wrote a concurring decision in which she agreed with the Board's analysis of the discrimination allegations under *FES* and *Wright Line*. She did, however, point out that, in her view, "the record contains strong evidence that antiunion animus motivated the Respondent's failure to hire the union applicants." Slip op. 6. In making that judgment, she relied on the newspaper advertising during a time in which the Respondent was asserting that it was relying almost exclusively on referrals and she drew a different inference than the Board majority from the hiring of only one union applicant among the six hired without referrals. Member Liebman also stated that, even if the General Counsel had met his initial burden under *Wright Line*, *supra*, she would conclude that the Respondent had met its burden of rebuttal, in view of its neutral and preexisting hiring policy.

B. Discussion and Analysis

Substantial justification does not mean substantial probability of prevailing on the merits. The General Counsel is not precluded from bringing forward close questions or even novel theories. The General Counsel need only show that he was "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). See *Abell Engineering & Manufacturing, Inc.*, 340 NLRB No 19 (2003), slip op. 1 and cases there cited.

Under the above principles, I find that the General Counsel's complaint and litigation theory was reasonably based. Here, as in Abell Engineering, supra, the Board considered an EAJA claim where it had reversed an administrative law judge in a Wright Line motivation case. Here, as there, the evidence advanced by the General Counsel was susceptible to inferences of unlawful motivation. Member Liebman's reference in her concurrence to what she viewed as "strong evidence" of antiunion motivation is telling. The numerical disparity in the number of union hires as opposed to nonunion hires was sufficient evidence of discrimination to justify a reasonable inference of discrimination. Nor did the evidence of Respondent's otherwise neutral referral policy compel a prosecutor or a trier-of-fact to trump that inference. It was reasonable to question the Respondent's policy, in view of the Respondent's use of newspaper advertising at the same time that it was allegedly hiring almost exclusively from referrals. Indeed, the Board majority simply drew different inferences from the evidence than the judge, stating, at one point, that the evidence "suggests" that antiunion discrimination did not influence the Respondent's hiring decisions. It also viewed the frequent newspaper ads differently than the judge or Member Liebman, stating that the evidence "suggests" a legitimate reason for those ads. Even apart from the views of the

JD-4-04

judge and Member Liebman, my independent analysis convinces me that the General Counsel was reasonably justified in advancing inferences from the evidence contrary to those ultimately drawn by the Board majority.

As for the failure to pay Stamper the same wage rate as other new hires, the General Counsel reasonably alleged that such discrimination was explainable by the same evidence that reasonably justified a discrimination allegation on the failure to hire or consider union applicants. In addition, the evidence indicates that Stamper asked for a higher rate based on his experience, but was denied that rate and accepted the lower rate. Although the Board declined to view the evidence as establishing a "take-it-or-leave-it" context, it was reasonable for the General Counsel to so characterize the evidence. This is especially true because a management witness testified that there is ordinarily some "back and forth" during individual wage negotiations. The Board implicitly recognized the reasonableness of the General Counsel's position when it concluded that even if the General Counsel had provided a basis for an inference of discrimination as to the treatment of Stamper, it would have found that inference to have been rebutted. Here again, the Board drew different inferences from the record evidence than those advanced by the General Counsel. But, in my view, the inferences sought by the General Counsel were reasonable.

I also agree with the General Counsel that the reasonableness of his position on disparate treatment is supported by case law. In particular, the General Counsel points to *Fluor Daniels, Inc.*, 304 NLRB 970 (1991). In that case, the Board held that the General Counsel had established a prima facie case of discrimination by refusing to hire a group of 48 qualified known union applicants, without even granting them an interview or making further contact with them, while hiring a group of applicants with weak or nonexistent union ties. The Board stated that "such a blatant disparity is sufficient to support a prima facie case of discrimination." Id. at 971. The General Counsel was entitled to rely on this case in litigating a case with similar evidence of disparity.²

C. Conclusion and Order

² The parties have skirmished somewhat over the fact that Respondent did not make available to the General Counsel, during the investigation of this case, the two management witnesses who testified about its referral policy. Although ordinarily a respondent may not rely on its lack of cooperation to support an application for fees under EAJA (see *Whitten Transfer Co.*, 312 NLRB 28 (1993)), I do not view the asserted lack of cooperation as significant in this case. The General Counsel reasonably issued the complaint based on the evidence available to him. Even after the witnesses testified, the General Counsel reasonably relied on that evidence notwithstanding the testimony of the Respondent's witnesses. A trier of fact could reasonably view the evidence of disparity as establishing an initial finding of discrimination and view the testimony of Respondent's witnesses that advanced a legitimate business reason for its hiring policies as not disturbing that finding, particularly in light of the continued and frequent use of newspaper ads.

The General Counsel was substantially justified in issuing the complaint in this case and pursuing the matter throughout all stages of the proceeding. I therefore recommend that the Respondent's application for fees and expenses be denied.³

Dated, Washington, D.C. January 16, 2004. Robert A. Giannasi Administrative Law Judge

If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended order shall, as provided in
 Sec. 102. 48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.